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FORMAL LEGAL OPINION

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Introduction

This formal legal opinion was requested from the Legislature's general counsel by the President of the Utah Senate and the Speaker of the Utah House of Representatives. In requesting the opinion, the President and Speaker sought answers to multiple legal questions about the vacancy in Utah's Third Congressional District and the process decreed by the Governor and Lieutenant Governor to fill that vacancy. This formal legal opinion answers those questions.

Questions Presented & Brief Answers

- I. Legally, when does the Third District Congressional vacancy occur? Does it occur at the time Congressman Chaffetz announced his intent to resign, or at the time when his resignation takes effect?**

Brief Answer: Persuasive authority indicates that a vacancy occurs when the resigning representative leaves office, but arguments could be made that a vacancy occurs when a representative tenders an irrevocably worded letter of resignation with a definite effective date to a proper authority. Because Representative Chaffetz's notice of resignation does not contain irrevocable wording, his notice of resignation is insufficient to create a vacancy under either interpretation.¹

- II. Based upon the answer to Question One, is the Writ of Election issued by Governor Herbert on May 19, 2017, which appears to be based on Representative Chaffetz's announced intent to vacate on a future date, valid?**

Brief Answer: The Governor only has the authority to issue a writ of election to fill a vacancy in Congress: "[w]hen vacancies happen." Because Utah's Third Congressional seat is still occupied and its occupant may have the ability to withdraw his resignation, the Governor was likely premature in his issuance of a writ of election for the purpose of replacing a sitting representative.²

- III. What is the scope of the Governor's authority under the provision of the U.S. Constitution requiring him to issue a writ of election to fill a midterm vacancy in the office of Representative in the United States**

¹ See analysis *infra* pp. 4-8.

² See analysis *infra* pp. 8-10.

House of Representatives? Is the Governor's authority limited to calling an election and stating the date of the election? If not, what additional authority does the Governor have, what is the source of that authority, and how does it differ from the Legislature's authority to prescribe the "Times, Places and Manner of holding Elections for . . . Representatives"?

Brief Answer: Under the United States Constitution, the Governor has the authority and an obligation to issue a writ of election to fill a midterm congressional vacancy. The best interpretation of the scope of that authority is that the Governor's authority is limited to calling and establishing the date of the election based on the times, places, and manner prescribed by the Legislature.³

- IV. Is the document issued by Lieutenant Governor Cox on May 19, 2017 valid? Does the Utah statute designating the Lieutenant Governor as the "chief election officer" provide him with the necessary authority to establish election dates and processes when a Congressional vacancy occurs? If not, what other or additional authority does the Lieutenant Governor have, what is the source of that authority, and how does it differ from the Legislature's authority to prescribe the "Times, Places and Manner of holding Elections for . . . Representatives"?**

Brief Answer: The Lieutenant Governor lacked the authority to issue the document, dated May 19, 2017, establishing his own "special election process" for filling a vacancy in the office of representative in the United States House of Representatives.⁴

- V. Who has the authority to establish the election process to fill a midterm vacancy in the office of Representative in the United States House of Representatives? Is it the Legislature, the Governor, or the Lieutenant Governor? Does the Legislature's authority to prescribe "[t]he Times, Places and Manner of holding Elections for . . . Representatives" include the authority to establish a process for qualifying candidates for the ballot for an election at which an individual is to be elected to fill a midterm vacancy in the office of Representative in the United States House of Representatives? Does either the Governor or Lieutenant Governor share that authority or have independent authority to establish that process? If so, what is the source and scope of that authority for the Governor or Lieutenant Governor?**

Brief Answer: The United States Constitution authorizes state legislatures to prescribe the election process, including the times, places, and manner, for a midterm congressional vacancy. This authority includes the process for qualifying candidates for the ballot. A court would likely conclude that this legislative power cannot be exercised by the Governor or lieutenant governor.⁵

- VI. Under Title 20A, Elections, of the Utah Code, the Legislature has established a process for electing an individual to the office of Representative in the United States House of Representatives at the regular general election. That process includes time frames for and**

³ See analysis *infra* pp. 11-13.

⁴ See analysis *infra* pp. 14-17.

⁵ See analysis *infra* pp. 11-13.

sequencing of events, a process for parties to nominate candidates, and a primary election. Does either the Governor or Lieutenant Governor have the authority to establish their own process for electing an individual to fill a midterm vacancy in the office of Representative in the United States House of Representatives, regardless of whether that process is similar to, or contains the same or similar elements of, the process established by the Legislature? If so, what is the source and scope of either the Governor or Lieutenant Governor's authority?

Brief Answer: A court would likely conclude that the Governor and Lieutenant Governor may not establish their own process for electing an individual to fill a midterm congressional vacancy. Under the United States Constitution, separation of powers principles, and Utah case law, the Governor and Lieutenant Governor should defer to the Legislature to establish this process, either by calling a special session, or by following the most analogous process already established—the regular general election process.⁶

Statement of Facts

On May 18, 2017, Utah’s current Third Congressional District Representative, Jason Chaffetz, wrote a letter to Utah Governor Gary Herbert stating his intention to resign from office:

I write to inform you in advance of my intent to resign from the office of U.S. Representative at the close of business on June 30, 2017. It has been a tremendous honor and privilege to serve the people of Utah as a Member of Congress. I look forward to working with you and others as a private citizen to continue to find ways to improve our remarkable State and Nation.⁷

On May 19, 2017, Governor Herbert signed an Executive Order/Proclamation issuing a writ of election (hereinafter “proclamation”) in which he ordered Lieutenant Governor Spencer Cox, as the Chief Elections Officer of the state, “to conduct a Special Election on Tuesday, November 7, 2017 to fill the imminent vacancy in the United States House of Representatives for the Third Congressional District of Utah.”⁸ In the Governor’s order, the Governor cited: authority to issue a writ of election under Article I, Section 2 of the United States Constitution; the requirement that he issue a proclamation calling an election to fill a vacancy under Utah Code Section 20A-1-502; and the ability to “call a statewide special election for any purpose authorized by law” under Utah Code Section 20A-1-203.⁹ Furthermore, the Governor stated that:

it is in the best interest of the public good to hold an election, and any necessary primary, consistent with the currently scheduled and planned for municipal general elections on November 7, 2017, and to hold those elections in a manner consistent with general

⁶ See analysis *infra* pp. 11-13.

⁷ Letter from Jason Chaffetz, Rep. of Utah’s Third Cong. Dist., to Utah Gov. Gary R. Herbert (May 18, 2017) (letter available at <https://twitter.com/thomaswburr/status/865317967302729732>).

⁸ Utah Exec. Order No. 2017-003 (May 19, 2017) (on file with the Utah Office of Legislative Research and General Counsel).

⁹ *Id.*

election procedures adopted by the legislature, and in a manner inclusive of the entire electorate.¹⁰

Also on May 19, 2017, Utah's Lieutenant Governor, Spencer Cox, released an order from his office (hereinafter "lieutenant governor's order") setting forth "the special election process and calendar for the June 30, 2017 vacancy . . ."¹¹ The Lieutenant Governor cited Utah Code Section 67-1a-2(a) as authorizing him to exercise "general supervisory authority over all elections," and "direct authority over the conduct of elections for federal, state, and multicounty officers," and Utah Code Section 20A-1-402 as declaring that he "shall render all interpretations and make all initial decisions about controversies or other matters' arising from the election code."¹² The calendar included in the Lieutenant Governor's order establishes a timeline for the special election, starting with the beginning of the period for all candidates to declare candidacy and intent to gather signatures, on May 19, 2017, and ending with the state board of canvassers canvassing Special General Election on November 28, 2017.¹³ That calendar contains similar elements to, but is different from the statutorily created process.

Congressional Vacancy

Question One: Legally, when does the Third District Congressional vacancy occur? Does it occur at the time Congressman Chaffetz announced his intent to resign, or at the time when his resignation takes effect?

Analysis:

The United States Constitution provides that the executive of a state must call a special election to elect a representative when a "vacanc[y] happen[s]" in the representation of that state.¹⁴ We were unable to find any case law that defined conclusively when a vacancy legally occurs. However, dicta in case law, a plain language reading of the term "vacancy," the lack of an unequivocal declaration that Congressman Chaffetz's seat is now vacant, and procedural precedent from the House of Representatives regarding the process for resigning from a seat,¹⁵ provide some insight as to whether Congressman Chaffetz's seat was legally vacant when Governor Herbert issued the proclamation for a special election.

¹⁰ *Id.*

¹¹ Order from Spencer Cox, Utah Lt. Gov., Regarding Special Election (May 19, 2017) (on file with the Utah Office of Legislative Research and General Counsel).

¹² *Id.*

¹³ *Id.*

¹⁴ U.S. Const. art. I, § 2, cl. 4.

¹⁵ In the absence of case law on the matter of House procedures, such as procedures governing the resignation and vacating of a seat, procedural precedent has significant weight, more so even than a federal statute may have. The U.S. Constitution Rules of Proceedings Clause leaves the determination of each chamber's procedural rules up to that chamber. U.S. Const. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . ."). Therefore, as a federal statute is enacted through a process that would eliminate cameral autonomy and introduce bicameralism into the requirements, procedural rules follow more closely the power bestowed to each house by the United States Constitution. See Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 Duke L.J. 177, 225 (2008). The House of Representatives refers to its precedent as a type of "common law" with "much the same force and binding effect." Lewis Deschler, *Deschler's Precedents of the United States House of Representatives*, at vii (1994), <https://www.gpo.gov/fdsys/pkg/GPO-HPREC-DESCHLERS-CONTENTS/pdf/GPO-HPREC-DESCHLERS-CONTENTS-2-3.pdf>. Further, "[p]arliamentary law has come to be recognized as *law*, in the sense that it is binding on the assembly and its members except as it may be varied by the adoption by the membership of special rules." *Id.* at vi-vii (emphasis in original). Accordingly, it is

Resignation from office is one of the means by which a “vacanc[y] happen[s]” in the House of Representatives, triggering the United States Constitution’s mandate for a governor to issue a “writ[] of election” to fill the vacant seat.¹⁶ Although the United States Constitution “mandates the calling of a special election to fill the vacancy[,] . . . that provision of the Constitution sets no time frame within which the ‘Executive Authority’ (the Governor) must act.”¹⁷ Further, case law is silent regarding an interpretation of “vacancy” for purposes of determining when a governor’s obligation to issue a writ of election begins.¹⁸ Accordingly, the issue before us is a novel issue of law that requires constitutional interpretation.

The most logical interpretation is that a “vacanc[y] happen[s]” when the representative’s resignation takes effect and the congressional seat is no longer occupied. This position is supported by dicta in case law, a plain language reading of the term “vacancy,” the lack of an unequivocal declaration that Congressman Chaffetz’s seat is now vacant, and commentary in House precedent. Another possible interpretation is that a “vacancy” occurs when a representative tenders an irrevocably worded letter of resignation with a specified effective date to an appropriate authority. This interpretation is supported by House precedent and past practice.

In 2010, a United States district court in *Fox v. Paterson* stated: “A vacancy now exists in the 29th District because the incumbent Congressman . . . resigned his office effective March 9, 2010.”¹⁹ The court did not rely upon the date when the notice of resignation was tendered. That date was irrelevant in the court’s analysis of whether the Governor timely called for a special election to fill the vacant seat. The court only looked back to March 9 to determine whether the Governor timely called for a special election. Arguably, the plaintiff voters in *Fox* would have lacked standing to complain about a lack of representation if their elected representative’s resignation had not yet taken effect. As is currently the situation in Utah, the voters remained represented in Congress until the day that the resigning representative actually left office. Therefore, under the dicta of *Fox*, Congressman Chaffetz’s seat is not currently vacant for purposes of determining when the Governor must issue a writ of election.

A particularly relevant definition of “vacant” in Merriam-Webster dictionary is “not occupied by an incumbent, possessor, or officer.”²⁰ As Congressman Chaffetz is not only continuing to “occupy” his seat but also conducting the business of representing the voters of Utah’s Third Congressional District, it is clear that his seat is not “vacant” under a plain-meaning interpretation of the term “vacancy.”

The House requires that a vacant seat “must” be “officially declared . . . in order that a special election may be held.”²¹ The House permits the Governor to make such a declaration. If the Governor fails to

highly likely that a court would interpret the rules to have a binding effect within the scope that they lawfully operate—that is, on the United States House of Representatives.

Despite the validity of the parliamentary procedures, the courts have ultimate authority to interpret the United States Constitution, including language governing when a vacancy occurs.

¹⁶ U.S. Const. art. I, § 2, cl. 4.

¹⁷ *Fox v. Paterson*, 715 F. Supp. 2d 431, 437 (W.D.N.Y. 2010).

¹⁸ Case law reveals that a governor most likely has limited discretion regarding how long the Governor may wait before issuing the writ of election after a representative has vacated a house seat. *See, e.g., id.* (holding that the Governor may wait to call for a special election for a reasonable time after the resignation of a representative before the Governor violates the U.S. Constitutional duty to call for a special election). Although this decision is not binding on the Governor of Utah, it provides persuasive authority for a court to consider.

¹⁹ *Id.* at 432.

²⁰ *Vacant*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/vacant> (last visited June 12, 2017).

²¹ 2 Lewis Deschler, *Deschler’s Precedents of the United States House of Representatives* 892 (1994), <https://www.gpo.gov/fdsys/pkg/GPO-HPREC-DESCHLERS-V2/pdf/GPO-HPREC-DESCHLERS-V2-2-3-5.pdf>.

make the declaration, then the House must make it.²² Currently, the House has not listed Congressman Chaffetz's seat in Utah's Third Congressional District as vacant.²³ Only resignations that have already taken effect are currently present on the House's list of vacancies. Further, Governor Herbert, despite having called for a special election, has not yet declared the seat vacant. Rather, the Governor proclaimed the vacancy to be "imminent" and the Lieutenant Governor²⁴ referred to the vacancy as "the June 30, 2017 vacancy." Accordingly, there is no official declaration that the seat is currently vacant, which indicates a strong notion that because the seat is still occupied, it is improper to declare the seat vacant at this time.

House precedent advises against a special election while a seat is still occupied. "[I]n view of the possibility of the withdrawal of a resignation which is not yet effective, a special election to fill the seat should be withheld until the effective date of the resignation."²⁵ House precedent describes how a representative may resign from office. A resignation may be tendered for any reason. But to be effective, the notice of resignation must (1) be worded irrevocably and (2) presented to a proper authority. Thus, it logically follows that under House precedent a notice of resignation does not create a "vacancy" unless the language in the notice of resignation "logically eclipse[s] any avenue of withdrawal" or "modification."²⁶

There is no prescribed language for a letter of resignation to satisfy the "worded irrevocably" requirement.²⁷ But the language must logically foreclose the possibility that a legislator may withdraw the resignation. A representative is empowered to withdraw a resignation when, for example, the wording of the resignation letter leaves an opportunity for withdrawal before the resignation takes effect.²⁸ For instance, a letter that made a resignation effective upon the Governor's calling for a special election afforded the resigning representative the power to withdraw the letter while the Governor had not yet called a special election.²⁹

Letters of resignation with future effective dates, however, leave questions regarding revocability. House precedent accepts future effective dates in notices of resignation.³⁰ States may, however, decide otherwise by statute.³¹ In the absence of an affirmative authorization or prohibition of a future effective date by the

²² *Id.* ("Whether a vacancy arises by death, resignation, declination, or action of the House, the vacancy must be officially declared, either by the state executive or by the House, in order that a special election may be held. Usually state authorities take cognizance of the vacancy without the requirement of notice by the House, and normally the state executive declares the vacancy to exist, particularly in cases of death, declination, or resignation.").

²³ *Current Vacancies*, Office of the Clerk: U.S. House of Representatives, http://clerk.house.gov/member_info/vacancies.aspx (last visited June 12, 2017).

²⁴ The Lieutenant Governor does not have proper authority under House requirements to declare a House vacancy.

²⁵ Deschler, *supra* note 21, at 897 (citing 2 Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* §§ 1220–1227 (1907)).

²⁶ 17 Lewis Deschler et al., *Deschler-Brown-Johnson Precedents of the United States House of Representatives* 402 n.3 (2011), <https://www.gpo.gov/fdsys/pkg/GPO-HPREC-DESCHLERS-V17/pdf/GPO-HPREC-DESCHLERS-V17-5-3-3.pdf>.

²⁷ Deschler et al., *supra* note 26, at 402.

²⁸ Deschler et al., *supra* note 26, at 416.

²⁹ Deschler et al., *supra* note 26, at 416.

³⁰ Deschler et al., *supra* note 26, at 416.

³¹ Deschler et al., *supra* note 26, at 424 ("Whether a resignation may specify a future effective date is a question of State law."). The Utah Legislature has neither authorized nor prohibited future effective dates in resignation letters from House Representatives. Utah law provides that a "vacancy" from statutory office occurs when the resigning individual becomes absent from the office. Utah Code Ann. § 20A-1-102 (West 2017). However, this definition of "vacancy" is insufficient to be dispositive regarding a congressional vacancy because members of Congress hold constitutional offices, not statutory offices.

Utah Legislature, the fact that the United States House of Representatives permits a resignation with a future effective date arguably does not bind a representative to resign on the date specified.³² Rather, until the effective date, there may remain “the possibility of withdrawal.”³³ Precedent reveals that many governors have successfully relied upon notices of resignation with future effective dates to call for a special election and even to elect a new representative before the resigning representative leaves office.³⁴ In an effort to formulate a reliable rule, House precedent states: “A resignation stating a future effective date (but worded irrevocably) has enabled a special election based on a prospective (but definite) vacancy.”³⁵ Such irrevocable wording has included, “effective at the end of the day on . . . , I am resigning my seat”; “This resignation is irrevocable and shall become effective on”; “I am irrevocably resigning my position as United States Representative . . . effective September 6, 2001.”³⁶

The language in the letter from Congressman Chaffetz does not contain irrevocable wording. Rather, the letter states, “I write to inform you in advance of *my intent* to resign . . . on June 30, 2017.” (emphasis added). It could be argued that an expression of an intent to do something in the future is not the same as an expression that one will actually do that thing in the future. Because intent is alterable, it is possible that Congressman Chaffetz’s letter has left open the possibility that he could withdraw the resignation if he has a change of heart.

Despite the practice of calling special elections based upon a resignation letter with a future effective date, and the House precedent of recognizing irrevocably worded letters with future effective dates as being an effective form of resignation, the mere fact that something has been done or has been permitted does not make that action lawful. In the examples provided in House precedent of governors acting upon a notice of resignation rather than the vacancy from a House seat, no issue ever arose where that governor’s action was challenged. It appears that in each of those situations, the representative maintained the express intention and satisfied the intent to resign contained in the prospective notice of resignation. There is no example or discussion regarding a situation where a representative’s intention changed after providing notice but before reaching the date that the resignation became effective. However, it appears that such a situation has been contemplated because the House precedent states: “[I]n view of the possibility of the withdrawal of a resignation which is not yet effective, a special election to fill the seat should be withheld until the effective date of the resignation.”³⁷ Further, absent a law binding a representative to fulfill an express intention to resign, it seems unlikely that a court would find that common practice is sufficient to make a notice of resignation binding upon its author, especially when the wording of the resignation letter is not irrevocable. It then follows that while a representative retains the right to withdraw a letter of resignation, that representative’s seat may not be considered vacant under House precedent.

³² There is nothing in Utah law that authorizes or prohibits a resignation from Congress to contain a future effective date.

³³ Deschler, *supra* note 21, at 897 (citing Hinds, *supra* note 25, §§ 1220–1227) (“The precedents of the House have established that a resignation may be made effective on a future date, but as the precedents above indicate, a resignation which does not specify a date certain on which it becomes effective is invalid and does not create a vacancy. And in view of the possibility of the withdrawal of a resignation which is not yet effective, a special election to fill the seat should be withheld until the effective date of the resignation.”). *See also* Fox v. Paterson, 715 F. Supp. 2d 431, 436 (W.D.N.Y. 2010) (regarding a governor’s announcement of his intent to call a special election at a later date, the court distinguishes between action and a “mere” statement of intent to act, which is insufficient to discharge a duty to act).

³⁴ Deschler et al., *supra* note 26, at 402.

³⁵ Deschler et al., *supra* note 26, at 402.

³⁶ Deschler et al., *supra* note 26, at 402–06.

³⁷ Deschler, *supra* note 21, at 897 (citing Hinds, *supra* note 25, §§ 1220–1227). *See also* Fox, 715 F. Supp. 2d at 436 (distinguishing between an intent to act and the action itself).

Conclusion

The law is silent regarding when a vacancy legally exists for the purpose of triggering the Governor's United States Constitutional right and obligation to issue a writ of election. The more compelling interpretation is that a seat is not "vacant" until a resignation takes effect. The plain meaning of the term "vacancy," dicta from case law, language in the House precedent, and the practice of declaring a seat vacant only after a representative has left office all support that conclusion. An alternative interpretation based on past practice and House precedent provides that a seat becomes "vacant" once a representative tenders an irrevocably worded letter of resignation with a definite effective date to a proper authority. While the first interpretation is the more compelling of the two, Representative Chaffetz's notice of resignation likely failed to satisfy even the terms of the broader interpretation. Accordingly, it is unlikely that Representative Chaffetz's notice of resignation created a vacancy for purposes of issuing a writ of election.

Question Two: Based upon the answer to Question 1, is the Writ of Election issued by Governor Herbert on May 19, 2017, which appears to be based on Representative Chaffetz's announced intent to vacate on a future date valid?

Analysis

The United States Constitution states that the Governor "shall issue writs of election" at the time "[w]hen vacancies happen in the Representation from any state."³⁸ The Constitution also empowers each state legislature to prescribe the "times, places, and manner of holding elections," in accordance with any requirements set by Congress.³⁹ Congress then, by statute, reinforces a legislature's constitutional authority, explaining that, "the time for holding elections . . . to fill a vacancy . . . may be prescribed by the laws of the several States . . ."⁴⁰ Under the color of Constitutional and Congressional authority, the Utah Legislature has prescribed, "[w]hen a vacancy occurs for any reason in the office of a representative in Congress, the Governor shall issue a proclamation calling an election to fill the vacancy."⁴¹ When interpreting the meaning of the United States Constitution, each clause in the Constitution must be presumed to have effect.⁴²

The "[w]hen vacancies happen" clause in the United States Constitution's grant of authority for a governor to issue a writ of election logically limits that authority to times when a House seat is, in fact, vacant. The plain language of the United States Constitution does not allow for a governor to issue a writ of election before a seat becomes vacant. Because it appears that a vacancy occurs when a representative

³⁸ The public has an interest and a constitutional right to representation in the House. *See Jackson v. Ogilvie*, 426 F.2d 1333, 1335 (7th Cir. 1970) ("The right is derived primarily from the provisions of Article I, § 2 that Representatives be chosen every second Year by the People of the several States and for apportionment among the states, read in the light of the history of the Great Compromise, by which in one branch the people, ought to be represented; in the other, the States. No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.") (citations omitted) (internal quotation marks omitted).

However, the public's right to representation is not violated by a limited gap in representation due to an elected representative resigning from office. *See, e.g., Fox*, 715 F. Supp. 2d at 432.

³⁹ U.S. Const. art. I, § 4.

⁴⁰ 2 U.S.C.A. § 8(a) (West 2017).

⁴¹ Utah Code Ann. § 20A-1-502(1) (West 2017) (emphasis added).

⁴² *Marbury v. Madison* 5 U.S. 137, 174 (1803).

actually leaves office, the authority for a governor to issue a writ of election appears to begin when the resignation actually takes effect.

Despite the plain language reading of the law, Governor Herbert is not the first governor to call a special election based on a resignation letter with a future effective date. Indeed, states have even elected a subsequent representative through a special election before the resignation of the incumbent took effect.⁴³ However, these actions contradict the advice that the House has provided to governors, specifically to, “withh[o]ld” a “special election . . . until the effective date of the resignation.”⁴⁴ The situation has not arisen where a resigning representative decides to withdraw a notice of resignation after the call or the completion of a special election. Nor has the validity of a special election, or its associated processes, been challenged based on the timing of the call for the election. Therefore, case law and precedent are silent regarding the legality of special elections that are called for and even held while the incumbent remains in office.

While an argument could be made that there is the need for an accelerated process to fill a congressional vacancy, that argument is not sufficient to justify the Governor’s actions. In light of the House recommendation regarding the timing of elections, as well as the United States Constitution’s limiting clause—“[w]hen vacancies happen”—a court is likely to find that Governor Herbert issued a writ of election before he had authority to do so.

It is important to note here that while the United States Constitution requires the Governor to call a special election when a vacancy occurs,⁴⁵ which, in our opinion, happens when a representative’s resignation takes effect, there is no federal law that allows for or prohibits a governor from calling a special election upon the anticipation of a vacancy. Thus, it is necessary to determine whether the Governor may have the power to at least call a special election before a vacancy actually occurs. The purpose of the special election is to select an individual to replace an elected representative. Only Congress or the representative personally may effect a representative’s removal from office.⁴⁶ Fundamentally, a governor does not hold the ability to remove a representative from office. Thus, if a governor were able to legally call for a special election before a resignation took effect, and the resigning representative then had a change of heart and chose to remain in office, it is unlikely that the Governor could force the resignation to take effect.⁴⁷ Lacking the ability to force a resignation, it follows that the Governor’s power to call an election to replace a sitting representative is limited to the time when the seat is actually vacant. A counterargument suggesting the need for an expeditious special election to limit the amount of time that citizens of the state go unrepresented in Congress is likely insufficient to overcome the constitutional framework that gives only Congress the power to remove a representative from office.

⁴³ Deschler et al., *supra* note 20, at 403 n.8.

⁴⁴ Deschler, *supra* note 15, at 897 (citing Hinds, *supra* note 19, §§ 1220–1227).

⁴⁵ See, e.g., *Jackson v. Ogilvie*, 426 F.2d 1333, 1337 (7th Cir. 1970) (holding that plaintiff’s constitutional right to representation under United States Constitution Article I, Section 2 was denied when the Illinois governor refused to call a special election to fill a vacancy in the House); *Am. Civil Liberties Union of Ohio v. Taft*, 385 F.3d 641, 649 (6th Cir. 2004) (holding that the Ohio governor’s refusal to issue a writ of election when one of Ohio’s seats in the House became vacant was a violation of the constitutional requirement to issue such a writ); *Fox v. Paterson*, 715 F. Supp. 2d 431, 435 (W.D.N.Y. 2010) (holding that to fulfill his constitutional requirement, the New York governor must actually issue a writ of election, not merely express an intent to do so at a later date).

⁴⁶ U.S. Const. art. I, § 2.

⁴⁷ The governor’s only viable argument would be that the representative was bound by the terms of the representative’s own notice of resignation, which may or may not be the case. See discussion, *supra* notes 13–33 and accompanying text (regarding irrevocability).

Congressman Chaffetz's notice of resignation indicated his *intent* to resign on a future effective date of June 30, 2017. The letter only expresses the Congressman's desire to "inform [Governor Herbert] in advance of [the Congressman's] intent to resign from the office of U.S. Representative at the close of business on June 30, 2017." It is likely that a vacancy in Utah's Third Congressional District has not occurred because Representative Chaffetz's expression of intent to resign on a future date does not irrevocably bind him to effectively resign on that date. Because Governor Herbert lacks the power to force Congressman Chaffetz to vacate his seat if the Congressman were to withdraw or decline to follow through on his intent to resign, it follows that the Governor lacked the Constitutional authority to issue a writ of election before the Congressman's resignation takes effect. A notice of intent to resign is valuable, however, for the purpose of allowing the Governor time to prepare for a special election so that if a special election is, in fact, needed it may be done in an efficient manner, within the parameters established by the Legislature.

Authority to Establish Election Time, Place and Manner

Question Three: What is the scope of the Governor's authority under the provision of the U.S. Constitution requiring him to issue a writ of election to fill a midterm vacancy in the office of Representative in the United States House of Representatives? Is the Governor's authority limited to calling an election and stating the date of the election? If not, what additional authority does the Governor have, what is the source of that authority, and how does it differ from the Legislature's authority to prescribe the "Times, Places and Manner of holding Elections for . . . Representatives"?

Question Five: Who has the authority to establish the election process to fill a midterm vacancy in the office of Representative in the United States House of Representatives? Is it the Legislature, the Governor, or the Lieutenant Governor? Does the Legislature's authority to prescribe "[t]he Times, Places and Manner of holding Elections for . . . Representatives" include the authority to establish a process for qualifying candidates for the ballot for an election at which an individual is to be elected to fill a midterm vacancy in the office of Representative in the United States House of Representatives? Does either the Governor or Lieutenant Governor share that authority or have independent authority to establish that process? If so, what is the source and scope of that authority for the Governor or Lieutenant Governor?

Question Six: Under Title 20A, Elections, of the Utah Code, the Legislature has established a process for electing an individual to the office of Representative in the United States House of Representatives at the regular general election. That process includes time frames for and sequencing of events, a process for parties to nominate candidates, and a primary election. Does either the Governor or Lieutenant Governor have the authority to establish their own process for electing an individual to fill a midterm vacancy in the office of Representative in the United States House of Representatives, regardless of whether that process is similar to, or contains the same or similar elements of, the process established by the Legislature? If so, what is the source and scope of either the Governor or Lieutenant Governor's authority?

Analysis⁴⁸

On May 19, 2017, Governor Gary Herbert signed a proclamation directing the Lieutenant Governor to “conduct a special election on Tuesday, November 27, 2017 to fill the imminent vacancy in the United States House of Representatives for the Third Congressional District of Utah.”

As authority for issuing the writ of election, the Governor’s proclamation cites Article I, Section 2, Clause 4 of the United States Constitution, which provides a mechanism for filling a vacancy in the United States House of Representatives. That clause provides: “When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.”⁴⁹ Utah’s Legislature has enacted a statute consistent with that clause: “When a vacancy occurs for any reason in the office of a representative in Congress, the governor shall issue a proclamation calling an election to fill the vacancy.”⁵⁰

Case law interpretations of Article I, Section 2, Clause 4 are based on a plain reading and suggest that the United States Constitution requires a governor to call an election to fill a congressional vacancy.⁵¹ A governor simply has no discretion to opt out of issuing a writ of election.

Although the Governor has the authority and an obligation to issue a writ of election, the timing, scope, content, and validity, of the writ are in question. The Governor’s proclamation contains more than a writ of election calling a special election: The proclamation directs the special election to be held November 27 and cites several sections of the Utah Code to describe the Lieutenant Governor’s authority over the special election. On the same day that the Governor issued his proclamation, the Lieutenant Governor, citing the same authority described in the proclamation, issued an order establishing the special election process and timeline.

This analysis explores the question of whether the Governor and Lieutenant Governor have constitutional authority to establish an election process and timeline, or whether the Governor and Lieutenant Governor’s constitutional authority is limited to calling an election to be held according to the process prescribed by the Legislature by law. The analysis is particularly apt because the entirety of Subsection 20A-1-502(1) states: “When a vacancy occurs for any reason in the office of a representative in Congress, the governor shall issue a proclamation calling an election to fill the vacancy.”⁵² This statute does not contain specific guidance to the Governor as to the “times, places, or manner” of the election.

Article I, Section 4, Clause 1 of the United States Constitution gives state legislatures control over an election to fill a vacancy for a congressional seat: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing[sic]

⁴⁸ Because questions three, five, and six are interrelated, we answer those three questions in this combined analysis.

⁴⁹ U.S. Const. art. I, § 2, cl. 4.

⁵⁰ Utah Code Ann. § 20-1-6(1) (1981) (current version at *id.* § 20A-1-502(1) (West 2017)).

⁵¹ *See, e.g., Taft*, 385 F.3d at 644 (stating that the Governor had a mandatory duty to issue a writ to fill a vacancy); *Jackson*, 426 F.2d at 1336 (“The language is mandatory according to the ordinary meaning of its terms.”); *Fox*, 715 F. Supp. 2d at 435 (same).

⁵² Utah Code Ann. § 20A-1-502(1) (West 2017).

Senators.”⁵³ Based upon that authority, Congress enacted 2 U.S.C. 8(a): “The time for holding elections in any State, District, or Territory for a Representative to fill a vacancy, whether such vacancy is caused by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.”⁵⁴

Case law supports an interpretation of Article I, Section 4, Clause 1 that grants states broad discretion to determine the date and election procedures for the election to fill a vacancy.⁵⁵ The discretion is pointedly given to “each State *by the Legislature* thereof.”⁵⁶

The United States Constitution plainly states that it is the state legislature, not the governor, that has the constitutional prerogative to prescribe the times, places, and manner of elections. The United States Constitution’s direction to the governor is merely to issue the writ of election.

Despite the discretion given to state legislatures, Utah is one of few states that has not defined the times, places, and manner for an election held specifically to fill a congressional vacancy. One could argue that the Legislature, by failing to establish the time, place, and manner for an election to fill a Congressional vacancy, has, by implication, granted this authority to the Governor because it is the Governor who must issue the writ of election. This argument does not appear to be supported by the United States Constitution.

Indeed, it is a fundamental principle of separation of powers that the legislature shall make the law and the governor shall enforce the law.⁵⁷ In line with the separation of powers principle of the Utah Constitution, the Governor must defer to the Legislature for the times, places, and manner of the special election. And, given that the Legislature has not thus explicitly prescribed the times, places, or manner of the special elections for a congressional vacancy, the Governor arguably should have either called a special session⁵⁸ for the Legislature to create a special election process for a congressional vacancy or

⁵³ U.S. Const. art. I, § 4, cl. 1.

⁵⁴ 2 U.S.C.A. § 8(a) (West 2017). Subsection 8(b), which was adopted in 2005—in the wake of the September 11, 2001 attacks—to address the possibility of mass casualties among members of the U.S. House of Representatives, likewise limits the governor’s role to issue the writ. In Subsection 8(b), the executive authority of any state in which a vacancy exists is required to issue a writ of election to fill the vacancy by a special election to take place within a specific time frame. The nomination process is not decided by a state’s executive authority, but instead by a state’s legislature.

⁵⁵ *Taft*, 385 F.3d at 648, 650 (noting that “legislative balancing between a state’s interests in ensuring fair and reliable elections, and its citizens’ rights to vote and to equal representation, is entitled to considerable deference”).

⁵⁶ U.S. Const. art. I, § 4, cl. 1.

⁵⁷ Utah Const. art. V, § 1 (“The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.”); *Springer v. Phil. Islands*, 277 U.S. 189, 202 (1928) (“Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement.”) (quoted with approval in *Rampton v. Barlow*, 464 P.2d 378, 381 (Utah 1970)).

⁵⁸ Utah Const. art. VII, § 6 (“On extraordinary occasions, the Governor may convene the Legislature by proclamation, in which shall be stated the purpose for which the Legislature is to be convened, and it may transact no legislative business except that for which it was especially convened, or such other legislative business as the Governor may call to its attention while in session . . .”).

should have deferred to the existing Election Code for the times, places, and manner, of a regular general election.⁵⁹

The Utah Supreme Court, in *Cox v. Laycock*, addressed another instance where the election statutes did not address directly the issue before the court. In that case, the Utah Supreme Court sought to determine the legislature's intent by relying on "the closest analogy" to fill the gap.⁶⁰ The closest analogy under Utah Law in this instance is the processes established by the Legislature for electing a congressman at the regular general election.

Although the Lieutenant Governor attempted to model the timeframes and processes in his order on the Election Code, he substantially altered the timeframes. By doing so, he replaced the Legislature's determination of timeframes and processes with his own.

The Governor and Lieutenant Governor may argue that observing the regular general election process would delay the election and cause the seat to be vacant for too long. Although there is case law suggesting that voters have a right to be represented in Congress, none of the cases determined an absolute outer limit on how long a delay would infringe upon this right.⁶¹ Even if the Governor's reason for creating the altered election process was to avoid delay, he cannot violate the constitutionally mandated principle of separation of powers to accomplish this objective. Rather than altering the times, places, and manner of the election prescribed by the Legislature, the Governor could have called a special session for the Legislature to define the process.

Conclusion

Ultimately it is for the courts to determine who has authority under the United States Constitution, given the silence in Subsection 20A-1-502(1), to define the times, places, and manner of the special election to a congressional vacancy. Although the Governor may argue that he should establish a new election process for filling Congressional vacancies himself because the Legislature has yet to affirmatively establish the times, places, and manner of Congressional vacancy elections, he could respect separation of powers and the Legislature's role in establishing election processes by calling the Legislature into special session. That approach is more solidly footed on the plain language of the United States Constitution and on Utah case law. United States Constitution Article I, Section 4, Clause 1 clearly empowers state legislatures, not executive authorities, with broad discretion to determine the times, places, and manner for an election to fill a congressional vacancy. And from a separation of powers perspective, the Legislature is entitled to prescribe the times, places, and manner of this election. The Governor could opt to call a special session for the Legislature to establish a process, or, based on Utah case law, the Governor and Lieutenant Governor could hold a special election based on the most analogous election process available—the regular general election process.

⁵⁹ See generally Utah Code Ann. §§ 20A-1-101 to -18-101 (West 2017).

⁶⁰ *Cox v. Laycock*, 2015 UT 20, ¶¶ 42-46, 345 P.3d 689 (reversing the district court's order for a special election to fill a vacant candidacy after an election for a county commissioner was contested and annulled and instead relying on existing Code procedures for filling candidate vacancies before a general election).

⁶¹ See generally *Am. Civil Liberties Union of Ohio v. Taft*, 385 F.3d 641 (6th Cir. 2004); *Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir. 1970); *Fox v. Paterson*, 715 F. Supp. 2d 431, 435 (W.D.N.Y. 2010); *Mason v. Casey*, No. 91-5728, 1991 WL 185243 (E.D. Pa. Sept. 18, 1991).

Authority of the Lieutenant Governor

Question Four: Is the document issued by Lieutenant Governor Cox on May 19, 2017 valid? Does the Utah statute designating the Lieutenant Governor as the “chief election officer” provide him with the necessary authority to establish election dates and processes when a Congressional vacancy occurs? If not, what other or additional authority does the Lieutenant Governor have, what is the source of that authority, and how does it differ from the Legislature’s authority to prescribe the “Times, Places and Manner of holding Elections for . . . Representatives”?

Analysis

The Lieutenant Governor cites three provisions of state law in support of his alleged authority to go beyond the calling of an election by the Governor and establish his own election process. None of these provisions grants him the authority that he asserts.

The first of these provisions is Utah Code Subsection 20A-1-203(1), which states that “[s]tatewide and local special elections may be held for any purpose authorized by law.” The Lieutenant Governor’s reliance on this provision, in relation to an election to fill a vacancy in the United States House of Representatives, is in error. The “special election” referred to in this provision is a narrowly defined term that encompasses only an “election held as authorized by Section 20A-1-203.”⁶² Utah Code Section 20A-1-203 describes several circumstances for which a special election may be called. That statute, however, limits the Governor to calling “statewide special elections.”⁶³ Utah Code Subsection 20A-1-203(77) provides that a statewide special election means “a special election called by the governor or the Legislature in which all registered voters in Utah may vote.” An election held to fill a vacancy in only one congressional house district is clearly not a statewide election, because only one-fourth of the Utah voters will be eligible to participate in the election. Thus, the special election provision relied on by the Lieutenant Governor does not apply to a special election to fill a congressional vacancy.

Moreover, even if the Lieutenant Governor were correct in his reliance on Utah Code Section 20A-1-203, that statute does not grant any authority to the Lieutenant Governor to establish an election process, but simply provides that the Governor’s executive order calling a special election specify the date and purpose of the statewide special election.⁶⁴

The Lieutenant Governor then relies on Utah Code Subsection 67-1a-2(2)(a), which refers to the Lieutenant Governor as the chief election officer and requires him to, among several other duties relating to elections, “exercise general supervisory authority over all elections”⁶⁵ and “exercise direct authority over the conduct of elections for federal, state, and multicounty officers and statewide or multicounty

⁶² Utah Code Ann. § 20A-1-203(25) (West 2017).

⁶³ *Id.* § 20A-1-203(3).

⁶⁴ *Id.*

⁶⁵ It is noteworthy that “election” is defined by Utah Code Subsection 20A-1-102(24) as “a regular general election, a municipal general election, a statewide special election, a local special election, a regular primary election, a municipal primary election, and a local district election.” (West 2017). It does not include an election to fill a congressional vacancy, except where it is part of an otherwise statewide election.

ballot propositions and any recounts involving those races.”⁶⁶ He does not, however, explain how this provision provides him with the authority to unilaterally establish an election process.⁶⁷

⁶⁶ The duty of the Lieutenant Governor to “exercise general supervisory authority over all elections” and to “exercise direct authority over the conduct of elections for federal, state, and multicounty officers and statewide or multicounty ballot propositions and any recounts involving those races” were added to Utah Code Section 67-1a-2 in House Bill 115 of the 2002 General Session, which was entitled “Technical Changes to Election Law.” H.B. 115, 54th Leg., Gen. Sess. (Utah 2002). The addition of these duties was not intended as the broad grant of authority to which the Lieutenant Governor now lays claim. Indeed, on both the House and Senate floors, the intent of the language change relating to the duties of the Lieutenant Governor was described by the floor sponsor as a recodification of provisions moved from other sections rather than a substantive change. *See* Audio recording: Technical Changes to Election Law, H.B. 115, Gen. Sess. (Jan. 28, 2002) (statement of Rep. Pace), <https://le.utah.gov/~2002/bills/static/HB0115.html> (“And the rest of the bill is recodification, just moving some issues in one section over to another so that we have a clear delineation of what the lieutenant governor’s duties are.”); Audio recording: Technical Changes to Election Law, H.B. 115, Gen. Sess. (Feb. 26, 2002) (statement of Sen. Hillyard), <https://le.utah.gov/~2002/bills/static/HB0115.html> (“And, finally, it recodifies the lieutenant governor’s responsibility as our chief election officer within one section of the code. So, the new language you see is actually being pulled out of other sections to put it all in one section.”); Audio recording: Technical Changes to Election Law, H.B. 115, Gen. Sess. (Feb. 27, 2002) (statement of Sen. Hillyard), <https://le.utah.gov/~2002/bills/static/HB0115.html> (“And then, it puts together, in one section, the lieutenant governor’s responsibility as our chief election officer.”). The sections referred to from which the language was moved were from former Utah Code Subsection 67-1a-2(3) and Section 67-1a-9 (which were repealed by H.B. 115). Neither of these preexisting provisions contained the language relied upon by the lieutenant governor. Because the changes in the language relating to the lieutenant governor’s authority were intended as a simple recodification, it can rightly be presumed that the new language was not intended as a broad expansion of the lieutenant governor’s authority (certainly not as broad as the Lieutenant Governor now claims), but, rather, another way of describing the authority already granted to the Lieutenant Governor in the preexisting provisions. (H.B. 115 removed the following language from Utah Code Subsection 67-1a-2(3):

As the chief election officer, the Lieutenant Governor shall not assume the responsibilities assigned to the county clerks, city recorders, town clerks, or other local election officials by the Legislature, nor become involved with the procurement of ballots. The county clerks, city recorders, town clerks, or other election officials shall determine the listing of the political parties on their local ballots. The Lieutenant Governor shall perform the following duties:

- (a) assist county clerks in unifying the election ballot;
- (b) prepare election information for the public and make such information available to the news media;
- (c) receive and answer election questions and maintain an election file on opinions received from the attorney general;
- (d) maintain election returns and statistics;
- (e) certify to the Governor the names of those persons who have received in any election the highest number of votes for any office, the incumbent of which is commissioned by the governor;
- (f) perform any other election duties formerly assigned to the secretary of state.

Utah Code Section 67-1a-9, which was repealed by H.B. 115, stated as follows:

The Lieutenant Governor shall prepare the necessary forms for the purposes stated in Section 17-20-5 and forward a supply of these forms to each county clerk. The Lieutenant Governor shall receive and file all certificates received under that section, and shall keep records, suitably bound and indexed, of the information contained in such certified statements received from the several county clerks, excepting justices of the peace and constables, the name of the person holding each office, the date of the officer’s election or appointment, the date of the expiration of the term of such officer, and such other information as said certified statements disclose.)

⁶⁷ Indeed, the only circumstance under which the Legislature grants the Lieutenant Governor anything even approaching the authority to establish an election process (though it does not actually do so), is when it grants authority, in times of a declared emergency, for the Lieutenant Governor to:

The Legislature routinely directs an executive branch officer or agency to supervise, put into effect, or enforce particular portions of the Utah Code. This direction, however, does not mean that the officer or agency can change the law even if the officer or agency believes it is necessary or convenient. Establishing an election process is exclusively a legislative function,⁶⁸ which the Legislature fulfills by enacting a law. An attempt by another branch of government to usurp this core legislative function would be a violation of the separation of powers provision of the Utah Constitution.⁶⁹ Indeed, even if it chose to try, the Legislature is without authority to grant this function to another branch of government. Any attempt to do so would be an unconstitutional delegation of legislative authority.⁷⁰

Similarly, the statutory provision cited by the Lieutenant Governor that “[t]he election officer shall render all interpretations and make all initial decisions about controversies or other matters arising under this chapter”⁷¹ does not grant him authority to alter, or add to, the law by establishing his own election process.⁷² The courts, who have the *ultimate* authority to interpret and decide controversies regarding the law, do not claim that this authority allows them to alter, or add to, the law.⁷³ And if the courts lack that authority, the executive branch certainly cannot lay claim to it.

Conclusion

Based on the foregoing analysis, none of the provisions relied upon by the Lieutenant Governor in support of his assertion of authority to establish his own election process to fill the pending congressional vacancy actually grant him the authority to do so. Establishing an election process is a power that may

designate a method, time, or location for, or relating to [voting on election day, early voting, the transmittal or voting of an absentee ballot or military-overseas ballot, the counting of an absentee ballot or military-overseas ballot, or the canvassing of election returns] that is different than the method, time, or location described in this title.

Utah Code Ann. § 20A-1-308. (West 2017). There has been no declared emergency in the present situation.

⁶⁸ This is expressly recognized by the United States Constitution, Article I, Section 4, which states, “The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.” *See also, City of Cleveland v. Keep Cleveland Safe*, 500 S.W.3d 438, 449 (Tex. Ct. App. 2016) (recognizing the “elective process” as the province of the legislative branch and cautioning against interference with this power by the judiciary); *In re Jones*, 476 A.2d 1287, 1293 (Pa. 1984) (“The authority to regulate the election process is vested in the Legislature.”).

⁶⁹ Utah Const. art. V, § 1 (“The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.”).

⁷⁰ *See State v. Gallion*, 572 P.2d 683, 688 (Utah 1977) (recognizing that “there are certain essential legislative functions which cannot be transferred to others”).

⁷¹ Utah Code Ann. § 20A-1-402 (West 2017).

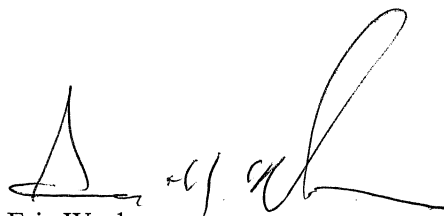
⁷² It is important to note that this authority is not limited to the “chief election officer.” Rather, it is granted to all election officers, which, depending on the type of election, includes the lieutenant governor, a county clerk, a municipal clerk, a local district clerk or chief executive officer, and a business administrator or superintendent of a school district. Utah Code Ann. § 20A-1-102(28) (West 2017).

⁷³ Our “interpretation [of a challenged statute] must be based on the language used, and . . . the court has no power to rewrite a statute to make it conform to an intention not expressed.” *Bus. Aviation of S. Dakota, Inc. v. Medivest, Inc.*, 882 P.2d 662, 665 (Utah 1994) (quoting *In re Criminal Investigation*, 754 P.2d 633, 640 (Utah 1988)).

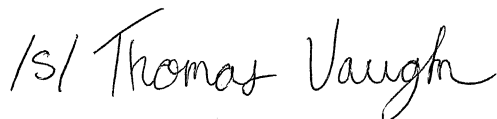
only be exercised by the Legislature and that the Legislature has not, and cannot, delegate to another branch of government. Thus, the Lieutenant Governor's order establishing his own election process is invalid.



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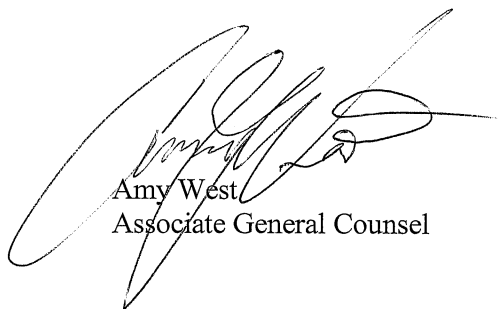
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